# United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

# Advice Memorandum

DATE: June 9, 2003

TO: Alvin P. Blyer, Regional Director
David Pollack, Regional Attorney
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Region 29

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: DiMarzio, Inc.
Case 29-CA-21206

The Region submitted this BE &  $K^1$  case for advice as to whether the Employer's counterclaim lawsuit against the Charging Party employee for filing an unfair labor practice charge is baseless and retaliatory. The counterclaim was dismissed by the federal district court upon its own motion, which also imposed Rule 11 sanctions against the Employer's attorney for filing a frivolous counterclaim.

We conclude that the Employer's lawsuit is baseless because it is unsupported by facts or law, and the suit is retaliatory because it directly attacks the Charging Party's attempts to seek redress through the Board's processes and her exercise of Section 7 rights. Accordingly, complaint should issue, absent settlement.

#### **FACTS**

DiMarzio, Inc. (the Employer), employed Audrey Jacques (Jacques) for almost seven years to assemble parts for electric guitars at its Brooklyn, New York, assembling facility. The Employer terminated Jacques in September 1996.

Shortly after the Employer terminated her, Jacques filed a Section 8(a)(1) unfair labor practice charge alleging that the Employer terminated her in retaliation for her protected concerted activities.<sup>2</sup> The Region's investigation failed to disclose evidence sufficient to support Jacques' claims. The Region dismissed Jacques'

<sup>&</sup>lt;sup>1</sup> <u>BE & K Construction Co. v. NLRB</u>, 122 S.Ct. 2390, 170 LRRM 2225 (2002).

 $<sup>^{2}</sup>$  Case 29-CA-20418.

charge; the Office of Appeals upheld the Region's decision to dismiss, noting that while Jacques had engaged in protected concerted activity in 1994 in joining other employees to complain about their wages, the Employer had granted wage increases, and Jacques' termination did not occur until two years later.

In April 1997, Jacques filed a charge with the New York State Division of Civil Rights alleging that the Employer discriminated against Jacques because Jacques suffers from a disability, bipolar depression. The state ceded authority to the Equal Employment Opportunity Commission, which, in turn, issued Jacques a right to sue letter. About one month later, Jacques filed suit under the Americans with Disabilities Act, alleging that the Employer terminated her because [FOIA Exemptions 6 and 7(C)].

In its answer to Jacques' lawsuit, the Employer counterclaimed that Jacques' unfair labor practice charge "was without basis in fact or law, and was frivolous." The Employer further alleged that Jacques' ULP charge

[w]as a willful and malicious act done by [Jacques] for the sole and exclusive purpose of harassing [the Employer], impugning [the Employer's] reputation, creating employee unrest, interfering with employee morale, and interfering with and damaging [the Employer's] business.<sup>4</sup>

The Employer initially sought unspecified damages "to exceed Five Hundred Thousand dollars (\$500,000)."

The district court, <u>sua sponte</u>, questioned the viability of the Employer's counterclaim, describing it as "an apparent 'naked form of retaliation against Jacques[.]'" After the district court judge "afforded . . [the Employer] 'the opportunity to submit legal authority and evidence to justify [the] counterclaim, if it [could],

<sup>&</sup>lt;sup>3</sup> Jacques' case, 97-CV-2884, is pending before the United States District Court for the Eastern District of New York, and is scheduled for trial in late June 2003.

<sup>&</sup>lt;sup>4</sup> The counterclaim also alleged that Jacques' New York State Civil Rights charge was frivolous and without basis in fact or law.

Jacques v. DiMarzio, 216 F.Supp.2d 139, 141 (E.D.N.Y. 2002), quoting from its earlier decision (200 F.Supp.2d 151, 162) denying the Employer's summary judgment motions.

and to explain why Rule 11 sanctions should not be imposed,  $^{\prime}$  " the Employer reduced its demand for damages to \$50,000.

After the Employer filed its counterclaim, Jacques filed the instant unfair labor practice charge. Jacques maintains that the Employer's counterclaim is retaliation for Jacques' earlier, unsuccessful unfair labor practice charge. The Region held this charge in abeyance pending the outcome of the underlying civil suit and the related counterclaim.

On August 23, 2002, the district court judge dismissed the Employer's counterclaim.<sup>7</sup> The judge described the Employer's counterclaim as "utterly devoid of factual allegations to raise a colorable claim under New York law for abuse of process, malicious prosecution, or prima facie tort."<sup>8</sup> The judge dismissed the Employer's counterclaim, holding that such a "cryptic, generalized, and ill-defined conclusory claim of harassment cannot serve as a substitute for pleading the requisite elements [for each] cause[] of action[.]"<sup>9</sup>

The judge also sanctioned the Employer's counsel under Fed.R.Civ.P. 11, fining him \$1,000 for filing a "frivolous" claim that was "patently devoid of allegations rising to a colorable claim for any of the tort theories that "[the Employer's] counsel . . . belatedly conjured in an attempt to avoid Rule 11 sanctions[.]"10 The judge also held that "the factually unsupported, conclusory lay nature of the counterclaim can only realistically be viewed, as suspected by the Court in its prior decision, as a bad faith retaliatory in terrorem tactic against [Jacques], . . . the type of abuse of the adversary system that Rule 11 was designed to guard against."11 The Employer's attorney paid the \$1,000 sanction; however, any Employer appeal of the dismissal of the Motion for Summary Judgment, the counterclaim, or the sanction must await the final judgment on Jacques' claim, pursuant to Fed.R.Civ.P. 54(b).

 $^{7}$  <u>Id</u>. at 145.

 $^{10}$  <u>Id</u>. at 143.

<sup>6</sup> Ibid.

<sup>&</sup>lt;sup>8</sup> Id. at 142.

<sup>9</sup> Ibid.

 $<sup>11 \ \</sup>underline{\text{Id}}$ . at 144.

#### ACTION

We conclude that the Employer's counterclaim lawsuit violates Section 8(a)(1) and (4). The Employer's lawsuit is baseless because it is unsupported by facts or law, and the suit is retaliatory because it directly attacks the Charging Party's attempts to seek redress through the Board's processes and her exercise of Section 7 rights. The Region should issue complaint, absent settlement.

In BE & K, the Supreme Court reconsidered the circumstances under which the Board could find a concluded suit to be an unfair labor practice. 12 Previously, in Bill Johnson's Restaurants, the Court had articulated two standards for evaluating lawsuits, one for ongoing suits and one for concluded suits. 13 For ongoing lawsuits, the Bill Johnson's Court held that the Board may halt the prosecution of the suit if it lacks a reasonable basis in fact or law and was brought for a retaliatory motive. 14 For concluded suits, the Court held that if the litigation resulted in a judgment adverse to the plaintiff, or if the suit was withdrawn or otherwise shown to be without merit, the Board could find a violation if the suit was filed with a retaliatory motive. 15 Thus, even if a concluded suit had been reasonably based, the Board could find an unfair labor practice if the suit was unsuccessful and retaliatory.

In BE & K, the Court rejected the Bill Johnson's standard for adjudicating unsuccessful but reasonably based lawsuits.  $^{16}$  The Court reasoned that the standard was overly broad because the class of lawsuits punished included a substantial portion of suits that involved genuine petitioning protected by the Constitution.  $^{17}$  The Court thus indicated that the Board could no longer rely on the fact that the lawsuit was ultimately meritless but must determine whether the lawsuit, regardless of the outcome, was reasonably based.  $^{18}$ 

<sup>&</sup>lt;sup>12</sup> 122 S.Ct. at 2397.

<sup>&</sup>lt;sup>13</sup> 461 U.S. 731, 747-749 (1983).

<sup>&</sup>lt;sup>14</sup> Id. at 748-749.

 $<sup>^{15}</sup>$  Id. at 747, 749.

 $<sup>^{16}</sup>$  BE & K, 122 S. Ct. at 2397, 2400, 2402.

<sup>&</sup>lt;sup>17</sup> Id. at 2399.

<sup>18</sup> <u>Id</u>. at 2399-2402.

As the Court in <u>BE & K</u> did not re-articulate the standard for determining whether a lawsuit is baseless, the standard set forth in <u>Bill Johnson's</u> remains authoritative. Under <u>Bill Johnson's</u>, the Board may go behind the bare pleadings to determine whether a lawsuit is baseless because it presents unsupportable facts or unsupportable inferences from facts, and to determine whether the suit presents "plainly foreclosed" or "frivolous" legal issues. <sup>19</sup> In doing this, the Board may draw guidance from a summary judgment decision and reject plainly unsupportable inferences from the undisputed facts and/or patently erroneous legal arguments. <sup>20</sup>

## The Employer's Counterclaim Lawsuit Is Baseless

We conclude that the Employer's counterclaim is baseless. The district court, acting on its own initiative, dismissed the Employer's counterclaim because it failed "to offer any evidence to support [its] claimed damages or any factual bases for [its] other conclusory assertions." In addition to being dismissed, the Employer's counterclaim failed to meet the objective standard for Rule 11; the district court found that it was "patently clear" that the Employer's claim had "absolutely no chance of success."

In its answer and counterclaim, and approximately one year later in its amended answer and counterclaim, the Employer merely asserted generally that Jacques' efforts to seek redress through administrative agencies substantially harmed the Employer's business and employees' morale. Only when faced with the court's <u>sua sponte</u> motion to dismiss did the Employer claim that it was entitled to damages under three potential theories: abuse of process, malicious prosecution, and prima facie tort. The Employer consistently failed, however, to present any evidence to support its claims.

The Employer cannot argue here that it did not have an opportunity in discovery to show how Jacques' actions were

<sup>19 461</sup> U.S. at 746. The Board's inquiries are subject to certain constraints. For example, the Board cannot make credibility determination or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge. Nor may the Board determine "genuine state-law legal questions. Id. at 744-46.

<sup>&</sup>lt;sup>20</sup> Id. at 746 n.11.

wrongful or improperly motivated, or that it was denied an opportunity to show how Jacques' actions harmed the Employer. On the contrary, the Employer was given an opportunity, with the benefit of discovery, to show that its lawsuit was not baseless when the district court judge, sua sponte, ordered the Employer to present such evidence, or face dismissal and Rule 11 sanctions. Even with that specific opportunity, the Employer was unable to present any evidence to support its claims. 22

To successfully prosecute an abuse of process claim under New York law, the Employer would have to establish certain elements, to wit: (1) that Jacques' suit was "regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act;" (2) that Jacques activated the process for the purpose of causing the Employer harm without economic or social excuse or justification; (3) that Jacques sought collateral advantage or corresponding detriment to the Employer which is outside the legitimate ends of the process, and (4) that the Employer suffered actual or special damages.<sup>23</sup>

To prevail on a claim of malicious prosecution under New York law, the Employer would have to show: (1) that Jacques instituted an action or proceeding; (2) that Jacques' action was begun with malice; (3) that there is no probable cause to support the proceeding; and (4) that the termination of the proceeding was in favor of the

<sup>&</sup>lt;sup>21</sup> Fed.R.Civ.P. 11 requires that attorneys or unrepresented parties certify, inter alia, that the filing is "not being presented for an improper purpose," and that "the allegations and other factual contentions have evidentiary support." Sanctions are imposed only "after notice and reasonable opportunity to respond" to any assertion that an attorney or unrepresented party has failed to show that a filing is not baseless.

<sup>&</sup>lt;sup>22</sup> See <u>Bill Johnson's</u>, 461 U.S. at 745-46 (to avoid finding of baselessness, party must present some evidence that raises at least a question the unlawful conduct occurred or some basis to believe that such evidence will be adduced in discovery); <u>Geske & Sons v. NLRB</u>, 103 F.3d 1366, 1376 (7<sup>th</sup> Cir. 1997) (same), cert. denied 522 U.S. 808 (1997).

Board of Education v. Farmingdale Teachers' Assn., 380 N.Y.S.2d 635 (1975); Onderdonk v. State, 648 N.Y.S.2d 214, 217 (1996).

Employer. $^{24}$  In addition, where, as here, the proceeding at issue is a civil action or proceeding, the Employer would have to prove special damages involving injury to, or interference with, personal or property rights beyond the ordinary burden of defending a lawsuit. $^{25}$ 

Finally, to succeed on a prima facie tort theory, the Employer would need to establish (1) that Jacques intentionally inflicted harm on the Employer, (2) that the harm Jacques inflicted resulted in special damages, (3) that the harm was without excuse or justification, (4) and that Jacques caused the Employer harm by an act or series of acts that were otherwise legal. The Employer must also plead and prove that the "sole motive" for Jacques' actions was "disinterested malevolence", that is, a malicious motive "unmixed with any other and exclusively directed to injure and damage another."

Under each theory, the Employer would have to prove that it suffered specific and measurable loss, and the Employer would have to plead such harm with sufficient specificity.  $^{28}$  Simply filing a counterclaim would be fatally insufficient.  $^{29}$ 

<sup>24</sup> Engel v. CBS, Inc., 145 F.3d 499, 502 (2d Cir. 1998);
Scheiner v. New York City Health and Hospitals, 152
F.Supp.2d 487, 503 (S.D.N.Y. 2001).

 $<sup>^{25}</sup>$  Engel, above, 145 F.3d at 502; Scheiner, above, 152 F.Supp.2d at 503.

<sup>26</sup> Del Vecchio v. Nelson, 751 N.Y.S.2d 290, 291 (2002),
citing Curiano v. Suozzi, 469 N.E.2d 1324 (1984); Drago v.
Buonagurio, 386 N.E.2d 821 (1978).

<sup>27</sup> Burns Jackson Miller Summit & Spitzer v. Lindner, 59
N.Y.2d 314, 333 (1983).

Del Vecchio, above, 751 N.Y.S.2d at 291 (citations omitted); Pappas v. Passias, 707 N.Y.S.2d 178, 179 (2000).

<sup>&</sup>lt;sup>29</sup> See <u>Del Vecchio v. Nelson</u>, above, 751 N.Y.S.2d at 291 (citations omitted) (counterclaim dismissed where defendant failed to allege special damages beyond the physical, psychological, or financial demands of defending a lawsuit); <u>City Streets Realty Corp. v. Resner</u>, 571 N.Y.S.2d 13, 14 (1991), citing <u>Allen v. Murray House Owners Corp.</u>, 515 N.Y.S.2d 18 (1987) (counterclaims for abuse of process, malicious prosecution and punitive damages were properly dismissed where claimant failed to allege special damages; "mere institution of a civil action is

Here, the Employer failed to present any evidence in support of its claims, even when faced with the threat of Rule 11 sanctions, and will not be able to produce evidence for the first time in any appeal it may file. The Employer did not show that Jacques undertook her suit specifically to cause the Employer harm, or gain an improper advantage over the Employer; that Jacques began her action with malice and without probable cause; or that Jacques was motivated by "disinterested malevolence." Moreover, the Employer failed to sufficiently plead the specific harm that Jacques' lawsuit had caused. Rather, the Employer has only been able to rehash its nebulous assertions regarding Jacques' actions; the Employer did not, indeed it cannot, plead the specific harm Jacques' actions had caused or otherwise specify what special damages the Employer has incurred. As the court noted, the Employer failed to present "any evidentiary material in support of special damages, or, for that matter, any other aspect of [its] three theories."30 In these circumstances, the Employer's allegations and other factual contentions have no evidentiary support and, therefore, its lawsuit is frivolous, objectively baseless, and has no reasonable chance of success.<sup>31</sup>

### The Employer's Lawsuit Is Retaliatory

The Supreme Court's decision in  $\underline{BE} \ \underline{\&} \ \underline{K}$  does not affect the retaliatory motive analysis here because this lawsuit, unlike the suit in  $\underline{BE} \ \underline{\&} \ \underline{K}$ , is baseless. Thus, while the Supreme Court in  $\underline{BE} \ \underline{\&} \ \underline{K}$  rejected the Board's standard of finding a lawsuit retaliatory solely because it is brought with a motive to "interfere with the exercise of protected

insufficient"). See also <u>Clarke v. Max Advisors</u>, 235 F.Supp.2d 130, 148 (N.D.N.Y. 2002).

DiMarzio, 216 F.Supp.2d at 143. The district court rejected the Employer's "frivolous" argument that New York's requirement of special damages is the "minority position [that] should be abandoned[.]" Citing recent decisions, the district court held that "New York law is firmly established that special damages are required for [the Employer's] claims." Id. at 144, fn. 5.

<sup>31</sup> Indeed, the Employer's failure to meet the established Rule 11 standards is reflected in the district court's assessment of sanctions against the Employer's attorney for attempting to litigate the Employer's baseless counterclaim. DiMarzio, 216 F.Supp.2d at 142-145.

[NLRA Sec. 7] rights,"<sup>32</sup> the Court's holding is limited to reasonably based lawsuits. With regard to reasonably based lawsuits, that standard would condemn genuine petitioning where a suit was directed at conduct that a plaintiff reasonably believed was unprotected.<sup>33</sup> Here, the fact that this baseless lawsuit was explicitly directed at Jacques' attempts to seek redress through the Board is sufficient to establish retaliatory motive.<sup>34</sup>

Finally, it would appear, as noted by the district court, that the Employer filed its counterclaim in order to send a message to Jacques and other DiMarzio employees that the Employer would similarly punish future self-help measures. Such an explicit nexus between Jacques' efforts to pursue a claim through the Board's processes and the Employer's retaliatory lawsuit establishes a clear violation of Section 8(a)(4).35

In sum, the Region should issue complaint, consistent with the above analysis, alleging that the Employer's lawsuit violated Section 8(a)(1) and (4). As part of the remedy, Jacques is entitled to be made whole for attorney's fees and other legal expenses incurred in defense of the Employer's counterclaim lawsuit against her, plus interest. 36

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 $<sup>^{32}</sup>$  BE & K, 122 S. Ct. at 2400.

 $<sup>^{33}</sup>$  Id. at 2400 - 2401.

LP Enterprises, 314 NLRB 580 (1994) (lawsuit alleging that employee knowingly filed false charges with the Board was baseless and retaliatory). See also, <u>Federal Security</u>, Inc., 336 NLRB No. 52, slip op. (2001), citing <u>Manno Electric</u>, 321 NLRB 278, 298 (1996), enfd. per curiam mem. 127 F.3d 34 (5th Cir. 1997) and LP Enterprises, above.

 $<sup>^{35}</sup>$  See, e.g., <u>Federal Security</u>, above, 336 NLRB No. 52, slip op. at 7.

<sup>36</sup> See Federal Security, above, 336 NLRB No. 52, slip op. at 2; LP Enterprises, above, 314 NLRB at 582.